FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN HABAN and ONE PIECE OF REALTY LOCATED AT 5800 S.W. 74TH AVENUE, MIAMI, FLORIDA, More Particularly Described as Lot 3, Block 3,of Camner Estates According To the Plat Book 58 at Page 21 of the Public Records of Dade County, Florida Together with All Appurtences Thereto and All Improvements Thereon,

Petitioners,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-21079-CIV-MOORE/O'SULLIVAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ONE SINGLE FAMILY RESIDENCE,
LOCATED AT 5800 S.W. 74th AVENUE,
MIAMI, DADE COUNTY, FLORIDA
INCLUDING ALL IMPROVEMENTS,
FIXTURES AND APPURTENCES
THERETO AND THEREON,

Claimant.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Claimant Haban's Motion to Suppress Physical Evidence Obtained Through an Unlawful Search and Seizure (DE#34, 11/1/02) and Claimant/Respondent Haban's Motion to Suppress Haban's Confessions, Admissions and Statements (DE #35, 11/1/02). This case was referred to United States Magistrate Judge John J. O'Sullivan by the Honorable K. Michael Moore, United States District Court Judge for the Souther District of Florida. Having heard testimony and oral argument and carefully considered the Claimant's motion, the court file and applicable law, the undersigned respectfully recommends that Claimant Haban's Motion to Suppress Physical Evidence Obtained

Through an Unlawful Search and Seizure (DE #34, 11/1/02) and Claimant/Respondent Haban's Motion to Suppress Haban's Confessions, Admissions and Statements (DE #35, 11/1/02) be **DENIED.**

BACKGROUND

On April 9, 2002 the government filed a civil forfeiture action against a residence located at 5800 SW 74th Avenue, Miami, Florida. The residence is owned by the Claimant Stephen Haban. The forfeiture action arises out of an alleged consent search of the Claimant's home on June 15, 2001. The search resulted in the seizure of approximately 84 live marijuana plants and hydroponic equipment used to grow marijuana.

FINDINGS OF FACT

On June 15, 2001, Miami Dade Police Department detectives went to eh claimant's residence located at 5800 S.W. 74th Avenue, Miami, Florida. The police had received information from a reliable confidential informant that the residence was being used to grow marijuana. Police officers entered the claimant's property through a front gate and through an ungated portion of the front yard that was adjacent to a driveway. The lead detective on the case approached the front door with her sergeant and lieutenant. There were four additional detectives in the front yard area of the residence. None of the detectives had their weapons drawn. The police knocked on the front door of the home. A female voice, later identified as the claimant's girlfriend, asked who it was and the police responded that ti was the police and that they wanted to talk with someone inside. The claimant's girlfriend went to the bathroom and told the claimant that the police were at the door. The claimant got out of the shower, wrapped a towel around

himself, retrieved the key to the inside lock of the front door and proceeded to the front door of his residence. The claimant looked out of a covered window in the front door and observed police officers. The police requested the claimant to open the front door. The claimant complied and opened the door several inches. The police identified themselves to the claimant and asked him to come outside. The claimant stepped outside onto his front porch. The claimant sat down at a table located on his front porch. The lead detective told the claimant that they were investigating allegations that marijuana was being grown in the claimant's house and that she had smelled marijuana when the door to the house was opened. The lead detective presented the claimant with a "consent to search" form and a "*Miranda* rights" form. The claimant appeared to be nervous. The claimant's girlfriend came out of the house and was seated at the table with the claimant. The claimant was told that is he did not sign the consent to search form that the police would attempt to get a search warrant.

The claimant signed the consent to search form at approximately 11:55 a.m. A police detective and his drug sniffing dog entered the residence. The dog handler reported to the lead detective that the dog had alerted to drugs in the residence. The claimant was read his *Miranda* rights and signed a form waiving those rights. The form divides the *Miranda* rights into four separate rights and asks whether the claimant understands each right. There is a " Yes" and a "No" spot for a person to initial and respond to the question "Do you understand that right?".[1] At the end of the explanation of each of the rights, there is a question that reads: "Knowing these rights, are you now willing to answer my questions without a

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[1] The claimant first began to place his initials in the "No' box which indicated that he did not understand his right to remain silent. The lead detective explained that if he understood the right, he should initial the "Yes" box which the claimant then initialed. The lead detective placed a check mark next to each of the "Yes" boxes.

lawyer present?" The claimant indicated on the form, by his initials, that he understood each right and that he agreed to answer questions without a lawyer. In addition, the claimant signed the form after the statement: "This statement is signed of my own free will without any threats or promises having been made to me."

A search of the claimant's residence revealed marijuana plants and growing equipment throughout the claimant's house including the claimant's kitchen, den, master bedroom, and master bedroom closet. The master bedroom closet contained men's and women's clothing and small cloned marijuana plants. The smell of marijuana in the house was strong and distinct. The claimant admitted that he was preparing for his third harvest and that he harvested his plants every ninety days. He told detectives that he sold his marijuana to friends for $375.00 per ounce.

The claimant and his girlfriend testified that the claimant repeatedly asked for counsel prior to signing the "Consent search" and "Miranda" forms. The claimant's girlfriend denied knowledge of the growth of any marijuana in the house and admitted that although she observed plants in the home, she did not know they were marijuana plants. The girlfriend testified that there was no unusual odor in the home except for when the claimant burned incense.

The claimant testified that he only signed the waiver forms because he was continuously denied his request for counsel and he believed that the police officers might be preparing to conduct a home invasion robbery of the claimant's residence. The claimant also testified that the harvest of the marijuana present in the home on the day of the search would produce twelve to fourteen pounds of marijuana. The claimant stated that most of the marijuana he produced was for personal

use.[2]

ANALYSIS

The Claimant asserts that he did not voluntarily consent to a search of his residence. The question of whether a claimant's consent was in fact voluntary or a product of duress or coercion, express or implied, is to be determined by the totality of the circumstances and is a matter for which the Government has the burden of proof. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2.d 497 (1980); Schenckloth v. Bustamante, 412 U.S. 218 93 S.CT. 2041 36 L.Ec.2d 854 (1972). While a warrantless search is generally lawful when conducted pursuant to a subject's voluntary consent, the government must prove that consent was given voluntarily, as an independent act of free will and not mere acquiescence to police authority. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). See also Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). To be considered voluntary, a consent to search must be the product of an essentially free and unconstrained choice. United States v. Garcia, 890 F.2d 355, 360 (11th Cir.

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[2] The undersigned finds that the testimony of the claimant and his girlfriend that his requests for counsel were denied is not credible. The undersigned notes that both of these witnesses either denied or minimized their participation in illegal conduct almost to the point of absurdity. The girlfriend denies any knowledge of the growing of marijuana in the residence even though the residence smelled of marijuana and there was marijuana growing apparatus throughout the residence. The claimant insists that most of the marijuana that was produced was for his own consumption. The court notes that the claimant's consumption of most of the thrity-six pounds of marijuana that the claimant admitted to producing in the nine months prior to his arrest would be virtually impossible. Not to mention that the thirty-six pounds of marijuana was valued at $216,000 (36 lbs. x 16 oz./lb x $375 oz). Based on the claimant's and claimant's girlfriend's testimony, when in conflict with the testimony of police detectives, is not credible.

1989).

In the case at hand, the totality of the circumstances demonstrates that the claimant's consent to search was voluntary. The claimant is an intelligent articulate person. The claimant signed the "Consent to search form" and acknowledged that he was aware of his right to refuse consent and that no threats or promises were made to him. There were approximately seven police officers present in the claimant's front yard at the time of consent. The claimant was only being spoken to by the lead investigator, there were no threats made and no guns were drawn or pointed at the claimant. When the claimant inquired what would happen if he refused to consent to the search, the police told him that they would apply for a search warrant. The facts are less coercive that those in Garcia, 890 F.2d at 360, where the Eleventh Circuit, found a defendant's consent to be voluntary when the defendant was arrested in the front yard of his house by fourteen law enforcement agents, and then taken inside after the agents conducted a "protective sweep" of the house. Garcia's request to provide a partial consent was denied by the police and Garcia was told that they would attempt to get a search warrant. Garcia was handcuffed when he gave the agents consent to search the house. The Eleventh Circuit noted that it had approved consent given under "far more coercive conditions" and stated, "we cannot conclude that these factors caused Garcia's consent to become involuntary." Id. At 362. In this case, the defendant was not arrested until after the consent to search was obtained and was not handcuffed. The evidence found within the defendant's residence should be admissible at trial.

MIRANDA RIGHTS

The Claimant asserts that any statements made by him should be suppressed because the Claimant did not voluntarily

waive his Miranda rights. The government argues that the Claimant signed a Miranda rights form and voluntarily waived his Miranda rights.

In order to establish a valid waiver of Miranda rights, the government must show by a preponderance of the evidence, that the subject voluntarily, knowingly, freely and intelligently waived those rights, with knowledge of the consequences of the waiver. Colorado v. Connelly, 479 U.S. 157, 168 (1986); see Moran v. Burbine, 457 U.S. 412, 421 (1986); Schneckloth v. Bustamante, 412 U.S. 218 (1973). The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the subject. Edwards v. Arizona, 451 U.S. 477, 482 (1981); see Moran, 457 U.S. at 421. Factors that should be considered in making such a determination include: age of the accused, educational level, level of intelligence, whether there was advisement of constitutional rights, length of detention, and the nature of the questioning. See Townsend v. Sane, 372 U.S. 293, 307 (1962); see also, Moore v. Dugger, 856 F.2d 129, 134-135 (11th Cir. 1988); Coleman v. Singletary, 30 F. 3d 1420, 1426 (11th Cir. 1994).

The government has demonstrated by a preponderance of the evidence, that the claimant received notice of his Miranda rights and with such notice, the claimant knowingly, freely and voluntarily waived those rights. The claimant is an intelligent articulate person. The claimant signed the "Miranda" form and indicated that not threats or promises had been made to him. The claimant was not threatened. The claimant's assertion that he repeatedly requested an attorney is not believable and his assertion that he was in fear of a home invasion robbery is not reasonable or believable. It is incredible to believe that a rogue group on police officers intent on conducting a home invasion robbery would first insist upon the homeowner signing "consent to search" and "Miranda rights" forms.

The undersigned recommends that the claimant's statements to law enforcement be admissible against him at trial.

RECOMMENDATION

For the foregoing reasons, the undersigned recommends that Claimant's Haban's Motion to Suppress Physical Evidence Obtained Through an Unlawful Search and Seizure (DE #34, 11/1/02) and Claimant/Respondent Haban's Motion to Suppress Haban's Confessions, Admissions and Statements (DE #35, 11/1/02) be **DENIED**. Pursuant to 28 U.S.C. §636(b)(1)(B) and (C), the parties may serve and file written objections to this Report and Recommendation with the Honorable K. Michael Moore, United States District Judge, within ten (1) of a receipt of a copy of this Report and Recommendation. See *Nettles v. Wainwright*, 677 F.2d §404 (5th Cir. 1982).

DONE AND ORDERED, in Chambers, in Miami, Florida, this 22 day of January, 2003.

John J. O'Sullivan
UNITED STATES MAGISTRATE JUDGE

copies provided to:
U.S. District Judge Moore
All Counsel of Record

Entered on FLSD Docket 1/23/03

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-21079-CIV-MOORE

UNITED STATES OF AMERICA,

Plaintiff,

ORDER GRANTING SUMMARY JUDGMENT

vs.

ONE PIECE OF REAL PROPERTY LOCATED AT 5800 S.W. 74th AVENUE, MIAMI, FLORIDA, MORE PARTICULARLY DESCRIBED AS LOT 3, BLOCK 3, OF CAMNER ESTATES ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 58 AT PAGE 21 OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA TOGETHER WITH ALL APPURTENANCES THERETO AND ALL IMPROVEMENTS THEREON,

_____/

THIS CAUSE came before the Court upon Plaintiff's Motion for Summary Judgment (**DE #44**).

THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises. It appearing that the Defendant has not responded to the motion for Summary Judgment, it is

ADJUDGED that the motion is, **GRANTED** by default. Fed. R. Civ. P. 56(e). Final Summary Judgment is hereby entered in favor of the Plaintiff and against the Defendant, together with costs to be taxed by the Clerk of this Court upon the filing of an appropriate bill of cost form. The

Clerk of Court is directed to mark this case as **CLOSED**. All pending motiosn not otherwise ruled upon are **DENIED** as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of January, 2003.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-21079-CIV-MOORE

UNITED STATES OF AMERICA,

Plaintiff,

vs. **FINAL JUDGMENT OF FORFEITURE**

ONE PIECE OF REAL PROPERTY LOCATED AT 5800 S.W. 74th AVENUE, MIAMI, FLORIDA, MORE PARTICULARLY DESCRIBED AS LOT 3, BLOCK 3, OF CAMNER ESTATES ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 58 AT PAGE 21 OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA TOGETHER WITH ALL APPURTENANCES THERETO AND ALL IMPROVEMENTS THEREON,

Defendant,

_____/

THIS CAUSE came before the Court for entry of judgment of forfeiture based on this Court's Granting of Summary Judgment, issued January 31, 2003. After a review of the record and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant, one piece of real property located at 5800 S.,W. 74th Avenue, Miami, Florida is hereby **FORFEITED** TO THE United States

of America. The United States Marshal shall dispose of the defendant property in accordance with the law.

DONE AND ORDERED IN Chambers, in Miami, Florida, this 4th day of March, 2003.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
All counsel of record
United States Magistrate Judge
John J. O'Sullivan

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-21079-CV-MOORE

UNITED STATES OF AMERICA.

Plaintiff,

vs.

ONE PIECE OF REAL PROPERTY LOCATED AT 5800 S.W. 74th AVENUE, MIAMI, FLORIDA, MOORE PARTICULARLY DESCRIBED AS LOT 3, BLOCK 3, OF CAMNER ESTATES ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 58 AT PAGE 21 OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA TOGETHER WITH ALL IMPROVEMENTS THEREON,

Defendant.

_____/

THIS CAUSE came before the Court upon Claimant's Motion for Reconsideration of Final Judgment (**Filed March 19, 2003**). A motion for reconsideration should only be granted to correct manifest errors of law or fact, or where newly discovered evidence is presented; reconsideration I snot an appropriate vehicle "to present authorities available at the time of the first decision or to reiterate arguments previously

made."[3]

Claimant has not raised any new arguments in his Motion, but rather revisits the arguments made before th Magistrate and in his motion for relief from judgment which this Court denied on February 24, 2003. Accordingly, it is **ORDERED AND ADJUDGED** that the Plaintiff's Motion for Reconsideration be, and the same is, hereby **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of March, 2003.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc:
All counsel of record

[3] *ABB Power T&D Co., v Gothaer Versicherungsbank VVAG,* 939 F. Supp. 1563, 1572 (S.D. Fla. 1996).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 02-21079- CIV-MOORE

Magistrate Judge O'Sullivan
UNITED STATES OF AMERICA

Plaitniff,

vs.

ONE SINGLE FAMILY RESIDENCE
LOCATED AT 4800 S.W. 74th AVENUE
MIAMI, DADE COUNTY, FLORIDA
INCLUDING ALL IMPROVEMENTS
FIXTURES AND APPURTENANCES
THERTO AND THERON,

Claimant

_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Claimant's Motion to Suppress Physical Evidence Obtained Through an Unlawful Search and Seizure (DE #34) and Claimant's Motion to Suppress Omissions and/or Statements (DE #35).

THE MATTER was referred to the Honorable John J. O'Sullivan, United States Magistrate Judge. After hearing testimony and oral argument, Magistrate O'Sullivan issued a Report and Recommendation dated January 21, 2003 (DE #16), recommending that Claimant's Motion to Suppress Physical

Evidence Obtained Through and Unlawful Search and Seizure (DE #34) and Claimant's Motion to Suppress Omissions and/or Statements (DE #35) be denied. Claimant filed objections to the Report and Recommendation on February 4, 2003 (DE #59). Accordingly, after a de novo review of the record herein, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that United States Magistrate Judge O'Sullivan's Report and Recommendation of January 21, 2003 be, and the same is, hereby ADOPTED as the opinion of the Court.[4] Claimant's Motions to Suppress are therefore DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of January, 2005.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
U.S. Magistrate Judge White
All counsel of record

[4] Contrary to the assertions of Claimant, federal courts are not bound by a state court's determination of search and seizure suppression issues. See Elkins v. United States, 364 U.S. 206 (1960).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 02-21079-CIV-MOORE

UNITED STATES OF AMERICA,

Plaintiff,

vs. **ORDER**

ONE PIECE OF REALTY LOCATED AT 5800 S.W. 74th AVENUE, MIAMI, FLORIDA, MORE PARTICULARLY DESCRIBED AS LOT3, BLOCK 3, OF CAMNER ESTATES ACCORDING TO THE PLAT BOOK 58 AT PAGE 21 OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA TOGETHER WITH ALL APPURTENANCES THERETO AND ALL IMPROVEMENTS THERON,

Defendant,

_____/

THIS CAUSE came before the Court upon Plaintiff's Motion for Final Judgment of Forfeiture (DE #91) and Defendant's Motion to Reconsider (DE #95).

UPON CONSIDERATION of the Motion the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

On January 4, 2005, this Court adopted the Magistrate's Report and Recommendation (DE #84), denying Haban's Motion to Suppress. Based on the denial of Haban's Motion to Suppress, Plaintiff's Motion for Summary Judgment was

granted on March 3, 2005 (DE #88). Defendant now moves for reconsideration, arguing that the federal government was collaterally estopped from re-litigating the state court rulings on the motion to suppress.[5] As the Eleventh Circuit noted in remanding this case, "federal courts . . . are not bound by the state court's decision." U.S. v. One Piece of Real Property Located at 5800 S.W. 74th Avenue, Miami, Florida, 363 F. 3d 1099, 1101 (11th Cir. 2004). Therefore, the federal government was not collaterally estopped from litigating Defendant's motion to suppress.

Accordingly, it is ORDERED AND ADJUDGED that the Defendant's Motion for Reconsideration is DENIED. It is further

ORDERED AND ADJUDGED, and based thereon, that Plaintiff's Motion for Final Judgment of Forfeiture is GRANTED in favor of the United States of America against the piece of real property located at 580-0 S.W. 74th Avenue, Miami, Florida. All right, title and interest to the said property is hereby forfeited to the United States pursuant to the provisions of 21 U.S.C. § 881 (a)(7) and the procedures set forth in the Controlled Substances Act, 21 U.S.C. § 801 et seq. The United States Marshal Service or its duly authorized agent shall dispose of the defendant property in accordance with the law. It is further

ORDERED AND ADJUDGED that this case is CLOSED. All motions not otherwise ruled upon are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of March, 2005.

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[5] Defendant also argues that he is entitled to a de novo evidentiary hearing on this motion to suppress. However, because this Court adopted the Magistrate Judge's Report and Recommendation, Defendant is not entitled to a de novo hearing. *See LoConte v. Dugger*, 847 F. 2d 745 (11th Cir. 1988).

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
All counsel of record